



2002

# A Module for Media Intervention: Content Regulation in Post-Conflict Zones

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## Recommended Citation (OVERRIDE)

Krug, P., & Price, M. E. (2002). A module for media intervention: Content regulation in post-conflict zones. In M. Price & M. Thompson (Eds.), *Forging peace: Intervention, human rights and the management of media space* (pp. 148-174). Edinburgh University Press. Retrieved from [http://repository.upenn.edu/asc\\_papers/146](http://repository.upenn.edu/asc_papers/146)

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# A Module for Media Intervention: Content Regulation in Post-Conflict Zones

## **Abstract**

During the past decade a number of bloody conflicts have focused international attention on the strategic role of the media in promoting war and perpetuating chaos. The challenges posed by systematic manipulation of the media have been particularly acute in Bosnia, Rwanda, Kosovo, East Timor - wherever the international community intervened to prevent atrocities, or stop them, or help rebuild society in their aftermath. Written against this backdrop, *Forging Peace* brings together case studies and legal analysis of the steps that the United Nations, NATO and other organisations, both governmental and non-governmental, have taken to build pluralist and independent media in the wake of massive human rights violations. *Forging Peace* maps an important aspect of contemporary peacemaking. It examines current thinking on the legality of unilateral humanitarian intervention, then analyses in graphic detail the pioneering use of information intervention techniques in conflict zones, ranging from full-scale bombardment and confiscation of transmitters to the establishment of new laws and regulatory regimes. As the social and economic role of the media expands and information technology spreads, driving governments in the world's trouble spots to seek more sophisticated ways of controlling public opinion, *Forging Peace* looks set to influence policy and debate for years to come.

## **Keywords**

role of media, media manipulation, media regulation

## **Disciplines**

Communication | Mass Communication

## A Module for Media Intervention: Content Regulation in Post-Conflict Zones

*Peter Krug and Monroe E. Price*

### Introduction

In the late 1990s, an institutional structure – an ‘architecture of media law’ – emerged in post-conflict zones for the temporary generation and application of norms regulating mass media content during the transition from international to domestic governance.<sup>1</sup> The creation of this system for post-conflict information intervention, which we will call a ‘module’ to illustrate its incipient nature, was predicated on the belief that a self-contained set of formal rules and procedures – a system of law – is necessary in the absence of an operating domestic legal regime in order to respond adequately to purportedly abusive media content and at the same time to provide safeguards protecting the exercise of expressive rights recognized under international standards.<sup>2,3</sup>

The module first appeared with the establishment of the Independent Media Commission (IMC) in Bosnia and Herzegovina in 1998.<sup>4</sup> It was borrowed by the United Nations Mission in Kosovo (UNMIK) and has undergone refinement since the establishment in Kosovo of the office of the Temporary Media Commissioner (TMC) in June 2000.<sup>5</sup> In both Bosnia and Herzegovina and Kosovo, it is being phased out, to give way to yet another new structure in an interim system of governance more closely tied to local institutions and personnel.<sup>6</sup>

It is likely that the module will be considered for use in future post-conflict settings, as well as exerting some influence on the further development of media regulation in Bosnia and Herzegovina and Kosovo. In this chapter, we examine aspects of the module’s structure, normative base, and process, and seek to identify its implications for development of a law of information intervention if indeed it is gaining traction as a portable ‘fix’ for employment in the increasing number of transitory post-conflict environments. Because it represents a refinement of the module, we will focus on the Kosovo (UNMIK) system while making references to its predecessor in Bosnia and Herzegovina. We do not claim to have many complete answers; instead, we merely hope to raise useful questions and to suggest perspectives from which to judge whether the module’s components are consistent with applicable international standards.

### Constructing the Module

#### *The Module in a Constitutional Order*

The module is a component of those systems of civil governance established by international organizations in post-conflict zones.<sup>8</sup> It operates as an international system imposed on a post-conflict territory in the absence of a functioning domestic legal system.<sup>9</sup> Because it serves equivalent purposes, we seek to assess the module the way we would a domestic system of media content regulation, starting with its constitutional foundations and then analyzing its structure, rules, and procedures. It must be seen not in isolation, but instead within a larger constitutional order that presents an institutional structure and a set of fundamental norms with which all governing acts – legislative, executive, and judicial – must comply.

In Kosovo, the basic document for the UNMIK administration is Security Council Resolution 1244, enacted pursuant to Chapter VII of the UN Charter.<sup>10</sup> In Section 6, Resolution 1244 authorized the secretary-general to appoint a Special Representative (the SRSG) to control the implementation of the international civil presence in Kosovo. In turn, the SRSG ordered the establishment of the TMC in June 2000.<sup>11</sup> The nature of this structure means that the module is part of a chain of delegation and supervisory responsibility that extends back from the TMC to the SRSG, the UN secretary-general, and ultimately to the UN Security Council.<sup>12</sup>

In addition to structure, an essential component of the UNMIK constitutional order is the formal recognition of fundamental norms that are legally binding on its institutions. Ultimately, the basis for these lies in Articles 55 and 56 of the United Nations Charter and in recognition of the principle that international organizations are bound to observe human rights norms. Meanwhile, these general principles have received greater specificity via the SRSG’s legislative enactments in UNMIK Regulations 1999/1 and 1999/24. UNMIK Regulation 1999/1, Section 2 (‘Observance of internationally recognized standards’), states in full:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.<sup>13</sup>

Regulation 1999/24, Section 1.3, is even more specific, stating that:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in: The European

Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; . . . [and] The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965.

Of this list, the European Convention is particularly noteworthy, both for the fact that it is the only regional instrument included and the fact that, at least in the field of mass media law, the media regulatory authorities in Kosovo have identified Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and, along with it, the Article 10 jurisprudence of the European Court of Human Rights (ECtHR), as the basis for defining the parameters of their activity.<sup>14,15,16</sup>

We also make an assumption that is important for our analysis: that the UNMIK institutions are bound by certain general principles of law that have been recognized by domestic legal systems and supranational and international organizations.<sup>17</sup> Of these, we are particularly concerned with separation of powers principles, such as the independence of prosecutors from the legislative and executive branches and provision of independent review of executive and prosecutorial acts.

### *The Module as a Self-Contained System of Governance*

The module is a self-contained, law-based international regulatory system separate from any domestic legal regime, with a legislator promulgating generally applicable binding norms, a standing authority empowered to prosecute perceived violations of those norms, and control mechanisms designed to supervise the prosecutor's acts.

The norms applicable to the mass media are generated from within this structure, rather than from an outside source. In Kosovo, this legislative function is performed by the SRSG, who issues generally-applicable normative acts in addition to performing executive functions.<sup>18,19</sup> The module's essential nature is defined by its core institution: a multi-dimensional agency that monitors the media, performs administrative functions such as the granting of broadcast licences, and acts as the prosecutor for imposition of sanctions for violations of the normative base. We will call this agency, which in Kosovo has been the Temporary Media Commissioner and in Bosnia and Herzegovina the Director-General, the 'Regulator'. (Before March 2001, when the IMC was merged with the Telecommunications Regulatory Agency to form the Communications Regulatory Agency, the IMC was headed by a 'Director-General'. The focus of our study is the IMC and the TRA before the merger.)

In Kosovo, the core of the Regulator's prosecutorial duties is found in the SRSG's authorization to the TMC to monitor media content and fashion remedies, including the imposition of sanctions, if the normative base is breached.<sup>20</sup> For example, as to print media, UNMIK Regulation 2000/37,

Section 2, authorizes the TMC to impose one or more of the following sanctions: a warning; a requirement to publish a reply, correction or apology; a fine of not less than DM 1,000 and not exceeding DM 100,000; seizure of equipment and/or printed material; or suspension or closure of operations.<sup>21</sup> The module's framers also have developed institutions for control of the Regulator's acts. In Kosovo, for example, the TMC cannot impose sanctions on the media without a finding by a three-member Media Hearings Board (MHB) that the normative base has been violated.<sup>22</sup> Also, the Kosovo and Bosnia and Herzegovina systems both provide for appellate review of sanctioning decisions. In Kosovo, the three-member Media Appeals Board (MAB) is empowered to uphold, modify, or rescind any TMC sanctioning decision.<sup>23,24</sup>

In all, the structural elements of the module suggest that attention has been paid to concerns about provision of safeguards against unconstrained, arbitrary acts by the prosecutorial authorities. However, further assessment of the effectiveness of the system in this regard, including the crucial question of the independence of the control mechanisms, requires evaluation of the normative base and the practical implementation of the module, to which we now turn.

### **Normative Base**

The module is predicated on the conclusion that some form of content supervision and regulation is necessary in post-conflict zones and, further, that such action will be effective only if there is in place a body of generally applicable norms: that is, a formal system of law rather than an ad hoc approach. This conclusion reflects adherence to the general principle that prosecution can be based on no grounds other than those rules published and in existence at the time of the offence.<sup>25</sup>

In the module, it is accepted that the normative base is temporary (although indefinite) pending return to domestic rule. While in force, however, the rules of the normative base represent the sum total of the Regulator's enforcement mandate. The temporariness of the rules may be of only cosmetic interest when it comes to the legality of the norms. Unconscionable rules, for example, could not be justified because of their short-lived nature.

With the exception of laws in effect in Kosovo in 1989, the normative base comprises solely SRSG Regulations and supplementary acts in the form of Codes of Conduct, drafted by the TMC and promulgated as binding law by the SRSG, for the print and broadcast media.<sup>26,27</sup> The centrepiece of this normative base is found in provisions of SRSG Regulations 2000/36 and 2000/37, promulgated by the SRSG on 17 June, 2000. Because of the central place it has occupied in the TMC's prosecutorial activity, a key provision is Section 4.1 of SRSG Regulation 2000/37, which states in full:

Owners, operators, publishers and editors shall refrain from publishing personal details of any person, including name, address or place of work, if

the publication of such details would pose a serious threat to the life, safety or security of any such person through vigilante violence or otherwise.

SRSR Regulation 2000/36, Section 5.1, applies exactly the same prohibition to 'Radio and Television Operators'. Another element in the normative base is the earlier SRSR Regulation 2000/4, 'On the Prohibition against Inciting to National, Racial, Religious or Ethnic Hatred, Discord, or Intolerance' promulgated on 1 February 2000 [the 'Hate Speech Regulation'].

The Codes of Conduct present more detailed rules. For purposes of examining the regulatory scheme in Kosovo, we focus on the Code of Conduct for the print media, since it is the instrument that has been applied most often in the TMC's prosecutorial practice. The Code's rules governing content and editorial practice are found in the following provisions:

### Section 2 (Provocative Statements)

2.1. Publishers will not write, print, publish or distribute any material that encourages crime or criminal activities or which carries imminent risk of causing harm, such harm being defined as death, or injury, or damage to property or other violence.

2.2. Publishers will not write, print, publish or distribute any material that denigrates an ethnic or religious group or implies that an ethnic or religious group is responsible for criminal activity.

### Section 3 (Privacy)

3.1. Publishers will not write, print, publish or distribute any material, that by intent or effect attributes criminal responsibility to any individual prior to a finding of guilt by a lawfully constituted tribunal.

3.2. Publishers will protect the identity of, and will not reveal the names, description, photograph, the likeness of, or specific information about any individual alleged to have committed a crime, unless authorities responsible for the administration of justice have expressly authorized the publication of such information, or unless the individual has been found guilty of the crime by a lawfully constituted tribunal.

### Section 5 (Separation of News and Opinion)

Publishers, while free to express their own views, will make every effort to distinguish clearly between comment, conjecture, and fact and will clearly entitle editorials and commentaries as such.

### Section 6 (False and Deceptive Material)

6.1. Publishers will not write, print, publish or distribute material that they know or ought to know to be false or deceptive.

6.2. Publishers will not write, print, publish or distribute material unless they have undertaken a prudent and reasonable inquiry to ensure the veracity of the material.

### Section 7 (Right of Reply)

7.1. Publishers will extend a right of reply when they have written, printed, published, or distributed content that places a person, group or an institution in an unfavourable light, if fairness and impartiality require it. Publishers will ensure that the reply is given equal prominence to the unfavourable content.

7.2. If printed, published or distributed content proves to be false, publishers will print, publish and distribute a correction as soon as possible. Publishers will ensure that the correction is given equal prominence to the false content.

The catalogue of rules found in the normative base is gathered from a variety of sources. It includes provisions commonly found in domestic legal systems, such as those prohibiting advocacy of violence and protecting individual reputation and privacy, as well as prohibitions, such as those found in Section 2.2 and Regulation 2000/4, that are grounded in international conventions.<sup>28,29</sup> It might be viewed, in effect, as an incipient international, or extra-state, law of news media content regulation that embellishes norms found in existing international instruments.<sup>30</sup>

The SRSR and TMC made selective decisions as to the content of the normative base, not merely absorbing into the module a set of rules from any particular legal system. It was important to the SRSR to claim that input was sought from local groups and foreign organizations during the drafting process.<sup>31</sup>

Viewed in broad perspective, the key characteristic of the normative base is that it reflects the precarious and recurrent tension in human rights law between free expression guarantees and the validity of interferences with the right of free expression, especially where the countervailing interest is protection of individual right to physical security. Care should be taken to consider whether those elements that are contemplated as a surrogate Code of Conduct are of a different quality (from a free expression point of view) from those rules that are akin to domestic law. While the set of rules may find counterparts in domestic settings, many elements might conflict with various constitutional frameworks, such as that established by the First Amendment of the US Constitution. For the UNMIK authorities, the resolution of this tension is found in the emphasis on a particular vision of 'media responsibility', one which incorporates, along with traditional aspects of legal regulation, major elements of professional journalistic ethics as well. This is in keeping with the Kosovo normative structure itself, which makes the Codes of Conduct legally binding and enforceable.

The emphasis on this vision of media responsibility was set forth by the TMC in a lengthy statement disseminated to the public on 9 March 2001, in which the TMC defended the imposition of monetary fines on two newspapers, *Bota Sot* and *Epoka e Re*.<sup>32</sup> The statement includes these excerpts:

[W]hat has resulted is a general misunderstanding of the substantive issues on which these cases were argued. The editors of the newspapers concerned are failing yet again in their principal duty, that of educating and informing their readers [ . . . ] Achieving the right balance between freedom on the one hand and accountability on the other is difficult. It may be a cliché, but does freedom of speech allow a person to yell fire in a crowded theatre? Most people would say that it doesn't and they would acknowledge that there should be some sort of legal and ethical framework to deal with this delicate balance [ . . . ] [A]s most journalists will tell you, the principles that uphold freedom of expression in international law are laid out in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. But, and as many conveniently forget, they also recognise that there are duties and responsibilities that come along at the same time . . . [*Bota Sot* and *Epoka e Re*] have shown a flagrant contempt for the basic tenets of professional journalism and the duties and responsibilities that are attached to the right of freedom of expression. Publishers and editors must understand that they are accountable both morally and in law for what they publish within the context of the society that they serve. Anarchy is not freedom and freedom of speech does not mean a free for all. It must be exercised with care and account must be taken of its consequences.

The scope of this vision of media responsibility has been broadened amid the particular circumstances in Kosovo. In Bosnia and Herzegovina, and in the period of regulation in Kosovo until June 2000, the focus was on the debilitating effect of hate speech on social and political stability. Thus, in February 2000, shortly after promulgation of the Hate Speech Regulation, OSCE Head of Mission Daan Everts stated:

We cannot tolerate hate speech anywhere in society – whether it is on the radio, in the classroom, in a newspaper or at a political rally. Which is why the issuing of the regulation on hate speech at the beginning of this month was so important. Most of all, the new regulation should work as a deterrent. I raise this now because while the mechanisms will exist to pull the plug on a radio or TV station, the same cannot be done to a newspaper. We have no plan to have a press law for printed media; in fact we are determined *not* to have such a law. It smacks of censorship. But if a paper publishes vitriol and bile, which incite hatred against a community or group – as some Kosovo papers have done – there is a legal route to take action against them. Anyone can lodge a complaint. It is up to the Court to decide whether the journalist, editor or publisher is guilty. And if they are they can be fined or jailed.<sup>33</sup>

As these remarks indicate, the international authorities were initially reluctant to take steps that went beyond sanctioning of hate speech to regulation of other

content as well, to use law to promote a broader notion of media responsibility. Instead, as reflected in the comments of Daan Everts, hopes were placed on journalists' self-regulation:

In any case, we hope that we won't have to use the Hate Speech Regulation. Instead we want to see self-regulation in Kosovo. Not self-censorship. But a mature look at what is published or broadcast and why. This is part of the role of a strong, democratic and independent media. Which is why we are pleased that all Kosovo's media have got together to form an Association. A central part of this Association is a Code of Conduct. Media outlets themselves will now be responsible to ensure that their professional colleagues and their rivals do not overstep the mark.<sup>34</sup>

However, later, following the events surrounding the death of Petar Topoljski, a Serbian UNMIK employee, in spring 2000, the SRSG's steps signalled a shift toward a more aggressive approach, abandoning media self-regulation and grounded in a public safety rationale.<sup>35</sup> As crafted in the context of lawlessness in Kosovo, this approach can be summarized to say: journalists have a responsibility, where a democratic state is not fully functioning and where violence is a regular means by which differences are resolved, not to infringe the physical rights of individuals or to increase social tension; where those duties are violated, the authority has the right to discipline.

There is the interesting suggestion, here, that greater leeway is permitted to the TMC because it is not only 'law' in the traditional sense, but Codes of Conduct in the self-regulatory sense, that are at issue. If the TMC were acting as a self-generated watchdog of the press, with its powers arising from ethical rules established by the press, then the restrictions, possibly, could be greater than if they originated from the State (or, here, its international equivalent). But, in fact, though the TMC may consider itself the substitute code-carrier incarnate, it is so only because of the origins of power in government.

The shift from hate speech to public safety as the core underlying public interest rationale is also significant. It shows that the normative base in the module can be flexible, lending itself to transfer to different post-conflict situations. The public safety rationale is grounded in the nature of the post-conflict setting in Kosovo, in which the UN administration faced a vacuum in civil institution infrastructure, most significantly in judicial institutions, and a chaotic situation marked by widespread violence and considerable potential for prolonged, on-going violence.<sup>36</sup> Thus, it was concluded, strong measures were viewed as necessary for protection of individuals from violence due to the absence of domestic legal authority and the existence of, or potential for, widespread lawlessness.<sup>37</sup>

Because of this shift from hate speech to public safety, the normative base in Kosovo extends beyond requirements imposed on domestic legal regimes in states party to instruments such as the Convention on the Prevention and

Punishment of the Crime of Genocide, International Covenant on Civil and Political Rights, and International Convention on the Elimination of All Forms of Racial Discrimination.<sup>38,39,40</sup> In other words, they go beyond the type of action that is required of states under international law, and rely on the type of action that is permissible under international law force.

The sum result of this dialectic, this effort to balance rights of free expression and countervailing rights, is that the scope of the normative base in Kosovo is quite narrow. In the end, the vision of media responsibility articulated in Kosovo gives wide latitude to news reporting and commentary that does not violate the public interest goals of protecting individuals and groups against incitement to violence and expressions of hatred. Thus, the issues in Kosovo are not those that typically give rise to the greatest concern among proponents of journalistic freedoms: the normative base does not equate protection of the public interest with protection of state interests, or with protection of public figures or institutions from critical commentary or with suppressing dissemination of facts unfavourable to the governing authorities. In this regard, while the normative base does proscribe the dissemination of material which journalists 'know or ought to know to be false or deceptive', it does not (in contrast to many domestic legal systems) dictate more stringent penalties when the material is injurious to particular public officials.<sup>41</sup> Nor does it include proscriptions against content found to be insulting to public officials or governmental entities.<sup>42</sup> Instead, the primary goal of the normative base, at least as applied in Kosovo thus far, has been to establish the kind of protection against incitement to violence found permissible in many domestic legal systems and the case law of the European Court of Human Rights, as well as the hate speech proscriptions found in international instruments.<sup>43</sup>

### Implementation of the Module: Process and Accountability

It is a truism that the test of a legal system's compliance with fundamental norms, as well as fairness and effectiveness, lies in the actual application and enforcement of its laws. This is certainly the case with the module as well. Among the recurring themes in the studies appearing in this volume is not only the need to define substantive standards, but also the structural and procedural requirements satisfactory to establish legitimacy for information intervention. Of these, one of the most pressing is that of institutional and procedural safeguards against improper interference with the exercise of expressive activity.

In a complex context, most of the individuals endowed with these powers of regulation in Bosnia and Herzegovina and Kosovo have acted, generally, responsibly and have deliberately sought to maintain the balance inherent in the system of information intervention. At the same time, however, it must be recognized that the structure itself, if adopted in future situations, could lend itself to potential abuses. These are new phenomena – it is only very

recently that international actors have begun to by-pass domestic legal regimes as the intermediaries of application of international human rights norms in the field of mass media regulation.<sup>44</sup> And the systems of accountability are also new and, if review is by the secretary-general or the Security Council, of awesome distance from the locales of post-conflict environments. That is a prominent reason for the existence and activity of 'freedom of speech' NGOs.

How does one review implementation of the module, application of the normative base and the procedures that have thus far been developed in its evolution? As before, we are guided by applicable international standards and general principles of law.<sup>45</sup> A number of these have received articulation in Article 6.1 of the European Convention on Human Rights and the case law of the European Court of Human Rights construing that provision.<sup>46</sup>

To do this, we will focus first on what we have called, bringing together the existing examples, the office of the Regulator, particularly its prosecutorial functions. Then, we will turn to questions about the module's control mechanisms; in particular, looking at issues of competence and degree of structural independence.

### *The Office of the Regulator: Public Relations, Investigation, Prosecution*

The multi-dimensional office of the Regulator includes both extra-legal and law-based functions. In other words, in some cases, it acts to advance certain policies by means of powers of persuasion, while in others – its more sensitive role – it acts to investigate and prosecute suspected violations of legal norms. The result is a combination of a managerial theory of compliance with traditional criminal law models of forcible enforcement.<sup>47</sup>

Within this range of activity, it is possible to delineate several elements of the performance of duties in this office: informal/public advocacy, investigative, and prosecutorial elements. Thus, in carrying out its functions, the Regulator acts as a public advocate for media responsibility, a monitor of mass media conduct and investigator of complaints, and as a formal prosecutor.

### *Extra-Legal Functions*

In general, the manner in which these functions are carried out can be attributed to questions of individual personal style; the very human, personal, direct management of the operation. Models are abstract, impersonal, described, usually, apart from the personnel who implement them. In the case of Kosovo, for example, the success and operation of the framework has been affected in important ways by the personal characteristics of the individual holding the office.<sup>48</sup>

The hallmark of the extra-legal activity has been a frank candour on the part of the Regulator, a readiness to articulate its motivations and its goals. Thus, the Regulator has been vocal in providing expressions of concern and pleas for

voluntary compliance with accepted journalistic ethics. The style is open, cajoling, and clearly conscious of the public effect of the TMC's pronouncements. At times, these statements to the journalistic community and the public at large have taken on the character of general observations, perhaps warning about legal violations but without identifying specific offenders. For example, in a 20 February, 2001 news release about its sanctioning decision against the newspaper *Epoka e Re*, the TMC stated:

The TMC remains deeply concerned about the current levels of inflammatory and potentially dangerous accusation and counter accusation in the Kosovo written press [ . . . ] Much of the press in Pristina serves up a daily diet of denouncement and insult. As a consequence the TMC considers that the flavour and tenor of the press at present contributes to the prevailing atmosphere of tension.<sup>49</sup>

Or, on other occasions, the TMC addressed concerns about individual news organs to the public and journalistic community with regard to conduct that, while considered irresponsible, was lacking in a legal basis to proceed to prosecution. An example is a TMC 26 March, 2001 news release, entitled 'Altering Photographs', which we reproduce here in full:

Last Friday the 23rd March 2001 all of the major newspapers in Kosovo carried the story of Thursday's tragic shootings at a Macedonian military checkpoint in Tetovo. These stories were all accompanied by photographs, most of which originated from the Reuters News Agency. With the exception of *Bota Sot* all these newspapers showed a black object on the ground close to the body of one of those who was killed. Indeed there has been considerable debate as to precisely what this object was.

The Office of the TMC understands that the circumstances surrounding this incident have caused considerable controversy. In this respect it is not the intention of the Office to comment on these circumstances or on the editorial line taken by any of the newspapers in their Friday editions. However, what is extremely alarming is the apparent removal, by *Bota Sot*, of a crucial piece of evidence from a photograph taken from an international source.

The Office of the TMC is currently in discussions with the Senior Legal Council of the Reuters News Agency to determine conclusively whether or not *Bota Sot* altered the original Reuters image to suit the thesis of their article. We have also consulted with them on how they may wish to proceed. Additionally, we are also corresponding with other international news and press agencies, including CNN and AP TN, and have discussed with them their footage and reports of the incident. All have confirmed the presence of the object in their respective photographic or video sequences and from the eye witness accounts of their journalists.

If it were indeed the case that *Bota Sot* did manipulate the images they obtained from Reuters, this would constitute gross professional misconduct. Furthermore, their attempts to portray all the other media who carried these images, as being misleading would be a further example of deliberate distortion in the face of the overwhelming evidence. It is the duty of editors to report the facts as accurately as possible and to distinguish opinion from fact. This is particularly important when tensions are high and the subject matter is so sensitive. To alter the available evidence to support an opinion and pass it off as news is unconscionable and discredits the profession of journalism.<sup>50</sup>

In looking to future applications of the module, we note that the above examples present a fine line between the Regulator's legitimate use of powers of public persuasion and the exercise of a chilling effect on the exercise of rights of expression. The reason for this, of course, is that the Regulator's public statements are always backed by its power to influence media conduct by means of the threat inherent in its authority to prosecute. It will take strict adherence to the normative base, limiting such use of public relations to content falling clearly within its confines, to keep the Regulator from crossing the line into exerting a 'chilling effect' on protected news reporting and commentary.

#### *Legal: the Authority to Investigate and Prosecute*

The legal power of the Regulator lies here: in the authority to investigate suspected violations, to assess whether a violation has indeed occurred, and to proceed with the prosecution process, which can culminate in the imposition of sanctions. It is here where the most sensitive concerns about abuse of authority can be found.

The Regulator's investigative activity serves multiple purposes: it provides the regulatory authority with information with which to establish guilt, as well as to identify ameliorating or exacerbating circumstances for the purposes of crafting remedies and/or penalties. Thus, in the *Epoka e Re* newspaper case, TMC Simon Haselock made an unannounced visit to the newspaper's offices (following an unsuccessful attempt to elicit information by mail from the newspaper), and in the *Bota Sot* case he engaged in extensive correspondence with the newspaper's editors.<sup>51,52</sup>

These activities present both positive and potentially negative aspects. They demonstrate a human touch, an opportunity for negotiation and mediation. On the other hand, they pose the spectre of the sort of arbitrary harassment that authorities in many countries have employed to threaten the mass media if their content is considered offensive. To guard against this risk, a crucial element will be the existence of effective independent review of the Regulator's actions. As we will discuss below, this is a weak link in the TMC system.

Another dimension of the investigative mode provides the Regulator with the opportunity to construe and apply legal norms in deciding whether or not to



proceed with formal prosecution. An example is the TMC's 25 April, 2001 letter to Mr Xhavit Haliti, demonstrating the TMC's willingness to construe international human rights norms in applying the normative base mandate.<sup>53</sup> Mr Haliti, a leading figure in the Democratic Party of Kosova (PDK), had asked the TMC to investigate the possibility of charges against the newspaper *Bota Sot*.<sup>54</sup> We quote an excerpt from his letter at length because of what it reveals regarding the TMC's investigative and prosecutorial style:

I have written to *Bota Sot* concerning your complaints and have discussed your concerns with them at length. Unfortunately, given the very specific nature of the Regulation I have to tell you that I do not consider that I can proceed on this matter any further. To be sure of a successful action under the Regulation all the various criteria that it stipulates must be satisfied and this is not possible in the articles to which you refer. Nevertheless, I must say that I consider these articles to have been deliberately sensational, unsubstantiated and provocative and I have made these and other points forcefully to the Editor and will continue to do so.

I also note from your letter that you understand the principle that as a public figure you will often be exposed to criticism and allegations. This is the one of the negative aspects of public political debate. In applying the conditions of the European Convention on Human Rights in regard to freedom of expression you will be aware that the European Court has taken the view that public figures are not entitled to the same measure of protection in cases of defamation than [*sic*] are private citizens. This is another reason why I believe that a case taken up on the basis of your complaints would not stand scrutiny by the Media Appeals Board.

This example serves as an illustration of TMC's efforts to operate within the constraints of law, including the fundamental norms in the UNMIK constitutional structure.

### Formal Prosecution

In Kosovo, the prosecutorial energies of the TMC have been focused on cases involving suspected incitement of violence against individuals. At time of writing, the TMC has invoked the formal sanctioning process three times, in actions against three different newspapers.<sup>55</sup> In each case, the charge was the same: violation of Section 4.1 of Regulation 2000/37.

The Regulator is empowered to prosecute suspected violations of the normative base, which is rendered enforceable by means of a range of remedies, including financial penalties and suspension or termination of operations.<sup>56</sup> The exercise of these powers implicates a number of general principles of law. First, according to those principles, the laws and process must be transparent and 'lawful' – that is, based on existing, published, generally applicable legal

norms generated by the legislature and not the executive branch. This means operating pursuant to generally applicable, published normative base. One measuring stick is to ascertain whether the norms in question have sufficient precision and clarity to satisfy the 'prescribed by law' requirement in Article 10(2) of the ECHR.<sup>57</sup>

As implemented in Kosovo and Bosnia and Herzegovina, the module, with its published normative base, appears to satisfy these standards. For example, in those cases in Kosovo in which prosecution has been invoked, these conditions appear to have been satisfied. In this regard, it should be noted that despite his evident opposition to *Bota Sot*'s alleged unprofessional conduct expressed in the 'Altering Photos' news release, TMC Simon Haselock did not pursue legal action against the newspaper.<sup>58</sup>

This contrasts with the action of the SRSG in June 2000, when it closed the office of the newspaper *Dita* for eight days on the grounds that *Dita* and its editors 'had violated the letter and spirit of Security Council resolution 1244 (1999)'.<sup>59</sup> The SRSG's action was taken in response to the events of spring 2000, when *Dita* identified Topoljski, as mentioned, a Serbian UNMIK employee, as a war criminal and provided both a photo of Mr Topoljski and details of his name, address and workplace information. Topoljski was found murdered on 16 May, and on 19 May, the editor of *Dita* published an open letter to the SRSG, indicating that the newspaper would continue to publish the names of individuals 'involved against Albanians'. It is doubtful that SC Resolution 1244, which does not refer to expressive activity in any way and is not directed toward private actors, contains any language that would support the conclusion that closure of a newspaper for publication of detailed information about an individual, even if done so in order to advocate violence against that person, would satisfy the 'prescribed by law' standard.<sup>60</sup>

Other general principles relevant to the module relate to the process itself: an accused's right to be heard, equality before the law, and opportunity for appeal.<sup>61</sup> The TMC's mandate in Regulation 2000/37 provides little direction on the procedures to be followed by the TMC in determining the existence of a violation and imposing sanctions.<sup>62</sup> However, the structure and process of prosecution have evolved quickly into a more formal set of legal rules and safeguards. In this regard, the important step was the MAB's decision in the *Dita* case, in which the MAB overturned the TMC's decision to impose sanctions on the newspaper because of procedural infirmities: violations of international norms and the law in effect in Kosovo in 1989.<sup>63</sup> In response to that decision, the TMC adopted measures to provide greater procedural safeguards for accused.<sup>64</sup> According to the Media Hearings Board Rules of Procedure, if the TMC concludes that a violation has occurred and that prosecution is warranted, the formal process must begin with the TMC's presentation of written notice (which we will call an 'Accusation'), which must inform the alleged violator of an opportunity to reply.<sup>65</sup> The indictment must then be presented to the MHB, which determines whether a violation has occurred and, in addition, recommends to the TMC whether there are any

mitigating or aggravating circumstances that should be taken into account when the TMC decides upon the appropriate remedies and/or penalties.<sup>66</sup> The TMC is not permitted to impose sanctions without a finding by the MHB that the media outlet or representative in question has violated one or more rules in the normative base.<sup>67</sup>

At the MHB hearing, both the TMC and the respondent, who may be represented by an attorney, are allowed to address the Board for no more than forty minutes, and each member of the Board may question the parties for up to thirty minutes. The Board may invite for oral presentation third-party witnesses and experts; the Rules of Procedure do not provide the parties a right to question those persons.<sup>68</sup> The burden of proof upon all such issues is upon the TMC.<sup>69</sup> The TMC's decision as to penalties may be appealed to the Media Appeals Board.<sup>70</sup> The MAB is empowered to uphold, modify, or rescind the TMC's sanctioning decision.

Throughout, questions of accountability and independence loom over this process. Is there sufficient sharing and diffusion of power to guard adequately against abuses by the authorities? Is the Regulator sufficiently independent from the legislator/executive SRSG? Is the Regulator accountable only to the law? By what mechanisms are the Regulator's acts reviewed to determine their compliance with these principles?

Here, again, certain general principles (sensitive to the special needs of a post-conflict context) should apply. For example, a prosecutor is bound by law, and only the law (here, this means the fundamental norms in the UNMIK Constitution, as well as the normative base); a prosecutor must be independent from legislative and executive branch control; and, to insure observance of these standards, a prosecutor's act must be subject to review by an independent agency.<sup>71</sup> The last point is perhaps the key to the entire system of administrative justice. In effect, it provides that there must – again subject to the possibly special circumstances of conflict zones – be a supervisory system of control sufficiently independent to make an objective determination as to whether the administrator has acted in compliance not only with other principles of administrative justice, but with all applicable legal norms as well.

While clearly an effort to assure procedural fairness, the module's structure and procedures raise certain questions from the point of view of compatibility with these principles. First, there is the question of the TMC's independence from the SRSG, which is both the UNMIK legislature and executive. According to the TMC's organic statute, the TMC has independent status and is temporary pending the establishment of effective domestic parallel structures.<sup>72</sup> The meaning of 'independence' in this context is not explained. The individual TMC is named by the SRSG; however, the SRSG is not involved in the day-to-day functions of the TMC, nor is there evidence that the SRSG has exerted any direct influence on the TMC's actions.<sup>73</sup>

Second, and perhaps more problematic, are a series of questions related to the roles of the TMC, the MHB, and the MAB. The MHB is analogous to a trial court, with the judge or jury making the ultimate determination of guilt or

innocence. However, this MHB decision is insulated from review. In addition, if a violation is found, it is the Regulator (the TMC) who decides on the nature of the penalties – definitely a judicial or jury function that should be outside the Regulator's powers. By possessing the ability to decide upon and impose sanctions, the TMC is both prosecutor and judge.

Next, the question must be asked, although it is very difficult to answer, whether the MHB and MAB are sufficiently independent to satisfy general principles and the UNMIK Constitution. In the context of ECHR Article 6.1, the ECtHR has construed 'independent' as independence from the legislative and executive branches, as well as the parties.<sup>74</sup> The European Court's determinations as to the independence of control bodies is very fact-intensive and, given the scope of our inquiry, we can simply cite the factors listed by the Court:

In order to determine whether a body can be considered to be 'independent' of the executive it is necessary to have regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.<sup>75</sup>

Finally, it should be pointed out that there are three significant areas in which the Kosovo MAB lacks competence: (1) review of the Regulator's investigative acts; (2) review of the MHB's decisions as to guilt or innocence; and (3) review of the SRSG's legislative acts.<sup>76,77,78</sup> As to the last of these, this means that the MAB's competence also does not extend to a power of review over the normative base itself, to determine if its provisions comport with the fundamental norms of the UNMIK Constitution.

In sum, significant steps in the evolution of the module have been taken to insure adequate safeguards for the mass media. However, particularly before the module is again employed in a post-conflict situation, attention should be devoted to further analysis and structural and procedural revisions. These matters go directly to fundamental issues about the module's legitimacy.

### The Quest for Legitimacy

The emerging system of information intervention, reflected in the module, rests on a thin veneer of acceptance within the global community at large: the assumption, by the UN Security Council and secretary-general, that regulation of media content is both acceptable and integral to democracy building in post-conflict societies, and that it is possible to conduct it in a way that is compatible with international free speech and free press standards.<sup>79</sup>

The initial emergence of the module met with intense criticism from free press advocates.<sup>80</sup> The significance of this lies in the reminder to the United Nations and other international organizations that this system of governance at bottom is reliant upon a public legitimacy, difficult to obtain or sustain in light

of the perceived threat to news media freedoms. From a slightly different perspective, the concerns about legitimacy might also stem from a democratic deficit in international institutions.

To address these concerns, it is necessary to have safeguards against heavy-handedness, or even the appearance of such heavy-handedness, by assuring procedural fairness and objectivity. In this regard, in addition to noting the binding fundamental norms in the UNMIK Constitution, much of our discussion has been grounded in an assumption that certain general principles apply here as a matter of law. But even if they might not as a matter of law, they should be followed as a matter of policy, for the sake of establishing and maintaining legitimacy.

Even more generally, the human rights rationale for what might be called 'aggressive peacemaking' and the intrusiveness into the zone of freedom of expression is a precarious one. To achieve legitimacy, processes of information intervention need popular support from the very people and institutions from whom it faces determined opposition – media NGOs, especially free speech and free press advocates. A critical sticking point for these NGOs is the question of whether circumstances ever can exist to justify a rearticulation and reframing of widely accepted standards of free speech/free press. How norms are developed, their very entry and maturation, will have an influence on how they are received by these significant groups. The UN must find ways of engaging those who 'vote' on the question of legitimacy.

The development and presentation of free speech norms in the information intervention context is important for another reason. Peacekeeping operations are partly designed to provide a context sufficiently altered and enhanced that a more democratic society can flourish after the operation has been dissolved. Construction of a public sphere that supports a democratic society is an element of that process. When an international governmental organization engages in regulation of the press, its actions may affect the nature of the political system that follows. How a regulatory rule is shaped, how it is presented in the society, how those who will be subject to a seemingly censorial rule react and accept that rule – all these are part of the difficult process of democracy development in a conflict zone.<sup>81</sup>

## Conclusion

The module is a work in progress, based on exigencies, which dictated not only its form and substance, but indeed its very rationale for existence. The post-conflict intervention functions within the existing organizational structure of the United Nations and is intended to be a temporary system designed to respond to an environment of lawlessness and violence and the absence of effective domestic legal institutions.

Two interlocking themes form the framework for understanding this normative base: the pervasive nature of human rights law, and the specific

post-conflict circumstances in Kosovo. Because they directly affect the exercise of free expression guaranteed in international human rights instruments, and because some of the normative base exceeds what is required of states to regulate hate speech under international norms, an over-riding question becomes whether the restrictions on media content are permissible interferences with media freedoms.

These have always been complex issues in domestic legal systems. The emergence of the module now presents a new dimension for the study of these long-standing issues in the sphere of mass media law.

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## Notes

1. This phrase is borrowed from Thompson and De Luce's contribution to this volume: Chapter 7: 'Escalating to Success? The Intervention in Bosnia and Herzegovina'.
2. Contributions to this volume emphasize the distinctions between pre-peacekeeping ('Phase One') and post-peacekeeping ('Phase Two') forms of information intervention.
3. Thompson and De Luce. Chapter 7.
4. The Office of the High Representative established the IMC on 11 June 1998, following the Conclusions of the 1997 Bonn Peace Implementation Conference that called for establishment of a temporary agency to monitor and supervise the mass media in Bosnia and Herzegovina. Decision of the High Representative, 'Decision on the Establishment [*sic*] of the Independent Media Commission', Sarajevo, 11 June 1998, Online [June 2001] available at <http://www.OHR.INT/mediare/d980611a>. Pech, 'Is Dayton Falling?' p. 4. In March 2001 the IMC was merged with the Telecommunications Regulatory Agency to form a new entity, the Communication Regulatory Agency (CRA). The head of this new entity is the Chief Executive Officer. The module discussed in this chapter is based on the IMC before the merger. See OHR, 'Decision Combining the Competencies of the Independent Media Commission and the Telecommunications Agency' of 2 March 2001. Online [October 2001], available at [http://www.ohr.int/decisions/mediadec/default.asp?content\\_id=75](http://www.ohr.int/decisions/mediadec/default.asp?content_id=75).
5. The TMC was created pursuant to regulations promulgated on 17 June 2000 by the Special Representative of the UN secretary-general in Kosovo: Regulation No. 2000/36, 'On the Licensing and Regulation of the Broadcast Media in Kosovo', Online [July 2001] available at <http://www.un.org/peace/kosovo/pages/regulations/reg036.html> and Regulation No. 2000/37, 'On the Conduct of the Print Media in Kosovo', Online [July 2001] available at <http://www.un.org/peace/kosovo/pages/regulations/reg037.html>. See Palmer, 'A Very Clear and Present Danger', p. 179.
6. In March 2001, a new entity, the Communications Regulatory Agency (CRA), was established in Bosnia and Herzegovina as a step in the transition toward local rule. The CRA's mandate includes assumption of the IMC's responsibilities. See the OHR, 'Decision Combining the Competencies of the Independent Media Commission and the Telecommunications Regulatory Agency', 2 March 2001. In Kosovo, it can be expected that significant changes in the module will be forthcoming as a result of the 'Constitutional Framework for Provisional Self-Government' signed into law by the SRSG on 15 May 2001 (UNMIK/REG/2001/9), Online [July 2001] available at <http://www.un.org/peace/kosovo/pages/regulations/reg01.09.html>. Sections 5.4(b) and 11.1 call for the establishment of a new media regulatory body, to be entitled the 'Independent Media Commission'. For the purposes of our contribution, we limit our description and analysis to the office of the Temporary Media Commissioner as of 15 May, 2001.
7. See, e.g., Hansjorg Strohmeier's recent proposal for 'quick-start packages' of existing structural and substantive law models for UN-administered territories, in Strohmeier, 'Collapse and Reconstruction', p. 62.
8. Matheson, 'United Nations Governance', p. 76; Wilde, 'From Bosnia to Kosovo', p. 467.

9. The module's normative base is a substitution of international law for a domestic legal regime. However, in contrast to traditional international regulatory systems, the subjects of regulation are not states, but private natural and legal persons. As Laurence Helfer and Anne-Marie Slaughter put it, this idea of the supranational – fulfilled by the emerging module – 'represents another departure from the bedrock assumption of traditional public international law: that states, functioning as unitary entities, are the only subjects of international rules and institutions and hence the only recognized actors in the international realm'. Helfer and Slaughter, 'Toward a Theory', p. 288.
10. UN Security Council Resolution 1244 (10 June 1999), Online [June 2001], available at <http://www.un.int/usa/sres1244.htm>
11. The organic acts for the TMC are UNMIK Regulations 2000/36 and 2000/37; and the IMC's organic instrument is the 'Regulation for the Independent Media Commission (IMC)', adopted by the IMC on 16 September 1998 (amended 8 September 1999, and 21 October 1999), Online [July 2001], available at [http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg\\_2](http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg_2)
12. The secretary-general's periodic status reports to the Security Council concerning Kosovo include information on 'media affairs', available at the UNMIK website, <http://www.un.org/peace/kosovo/pages/kosovo1.shtml>
13. UNMIK/REG/1999/1, 25 July 1999, Online [June 2001] available at <http://www.un.org/peace/kosovo/pages/regulations/reg1>
14. Article 10 ('Freedom of Expression') states in full:
  1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
  2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Among the many secondary sources on the extensive Article 10 jurisprudence of the ECtHR, see: Harris et al., *Law of the European Convention*, pp. 372–416; Van Dijk and Van Hoof, *Theory and Practice*, pp. 557–85; Krug and Swann, *Supplement to ABA-CEELI*
15. For the European Court of Human Rights' Judgements, see <http://www.echr.-coe.int>
16. See, e.g., decisions of the Media Appeals Board in the cases of: *Belul Begaj and the Newspaper Dita*, Appellant and Temporary Media Commissioner, OSCE, Respondent (16 September 2000), paras 68–75, Online [July 2001], available at <http://www.osce.org/kosovo/indbodies/tmc/cases/dita.php3> and *Sylejman Aliu and the Newspaper Bota Sot*, Appellant and Temporary Media Commissioner, OSCE, Respondent (19 February 2001), paras 71–5 (copy on file with the authors).
17. Reinisch, *International Organizations*, pp. 318–22.
18. In referring to the SRSG, we incorporate those consultative institutions that

- function within its Joint Interim Administrative Structure (JIAS), such as the Kosovo Transitional Council (KTS) and Interim Administrative Council (IAC).
19. UNMIK Regulation 1999/1 ('On the Authority of the Interim Administration in Kosovo'), 25 July 1999, Section 1.1, states in full: 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.'
  20. In Bosnia and Herzegovina, similar powers were conferred on the director-general.
  21. A similar list for broadcasters, but adding suspension or termination of broadcast licenses, is found in UNMIK Regulation 2000/36, Section 3.1.
  22. 'Media Hearing Board Rules of Procedure' (adopted 7 November 2000) Sections 17–18. Online on the OSCE Mission in Kosovo Web site, <http://www.osce.org/kosovo>. The three members (two local, one international) of the MHB are appointed by the TMC, based on nominations from three organizations: the Association of Kosovo Journalists (AKJ), the Kosovo Law Center, and the Organization of Security and Cooperation in Europe (information in e-mail message from TMC Simon Haselock to the authors, 12 March 2001).  
In Bosnia and Herzegovina, a seven-member Enforcement Panel decides cases regarding the director-general's imposition of penalties, according to the Section 16.1 of the 'IMC Procedure for Handling Cases' (adopted 8 December 1998, and amended 9 June 1999, and 21 October 1999), Online [July 2001], available at [http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg\\_3.html](http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg_3.html). The decision as to the penalty is also made by the Enforcement Panel. In Kosovo, this is made by the TMC alone. The Regulator in the Bosnia and Herzegovina system (the director-general) also serves as chair of the Enforcement Panel ('IMC Procedure for Handling Cases', Sections 13.1 and 15). Demonstrating somewhat greater sensitivity to separation of powers issues, the TMC in Kosovo is not a member of the MHB. In its 7 November 2000 news release announcing the issuance of the MHB Rules of Procedure and formation of the MHB, the TMC stated that the MHB would be an 'independent administrative panel'. Online [June 2001], available, [http://www.osce.org/news/generate.php3?news\\_id=1243](http://www.osce.org/news/generate.php3?news_id=1243). In its 19 February 2001 *Bota Sot* decision, para 69, the Media Appeals Board repeated this statement.
  23. On 31 August 2000, the MAB adopted and issued two sets of procedural rules: 'Rules of Procedure (Conduct of Hearings)' 001/2000, 31 August 2000. See OSCE Mission in Kosovo web site, <http://www.osce.org/kosovo> and 'Rules of Procedure (Filing of Appeals)', Online [June 2001], available at <http://www.osce.org/kosovo/indbodies/mab.php3>
  24. UNMIK Regulation 2000/36, Section 4.5; UNMIK Regulation 2000/37, Section 3.1. The MAB's three members (two international and one local) are appointed by the SRSG upon nomination by the Deputy Special Representative of the Secretary-General for Institution Building (UNMIK Regulation 2000/36, Section 4.4). In Bosnia and Herzegovina, the IMC Council, the IMC's regulatory body, hears appeals from decisions of the director-general and Enforcement Panel ('IMC Procedure for Handling Cases' Sections 11.7, 16.5, and 23.1).
  25. International Covenant on Civil and Political Rights (1966), Article 15.1; ECHR, Article 7.1. In the area of freedom of expression, this principle is expressed in the requirement in Article 10.2, ECHR, that any interference with the exercise of freedom of expression must be 'prescribed by law'.

26. UNMIK Regulation 1999/24, Section 1.1 ('Applicable Law'), states in full:  
The law applicable in Kosovo shall be:  
a. The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and  
b. The law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.  
The date 22 March 1989 is the date on which the Republic Serbia Assembly formally terminated most elements of Kosovo's autonomous status. As of June 2001, the TMC's publications and enforcement actions have never referred to any provisions from the legal base identified in Section 1.1(b).
27. See 'Temporary Code of Conduct for the Print Media in Kosovo' and the 'Code of Conduct for the Broadcast Media in Kosovo'. The codes were promulgated pursuant to SRSG Administrative Direction 2000/20 [UNMIK/DIR/2000/20] of 18 September 2000. The documents are online at the OSCE web site: <http://www.osce.org/kosovo>
28. Regulation 2000/37, Section 4.1; Code of Conduct Section 2.1. See, for example, the United States Supreme Court decision in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
29. These international conventions include: the Convention on the Prevention and Punishment of the Crime of Genocide, International Covenant on Civil and Political Rights, and International Convention on the Elimination of All Forms of Racial Discrimination.
30. Reflecting perhaps the challenging conditions in which such drafting takes place, certain provisions in the normative base are suspect on technical drafting grounds, perhaps under the 'prescribed by law' test of Article 10.2, ECHR. For example, Section 4.1 says nothing about the State of mind of the publisher (in contrast to the *Brandenburg* test's 'directed toward . . .'). In Section 2.1, the term 'other violence' is quite vague.
31. See, for example, the speech by Ambassador Daan Everts, OSCE Head of Mission, on the occasion of the opening of the new studios of Radio Television Kosovo (RTK), 16 February 2000. Online at the OSCE Mission in Kosovo web site: <http://www.osce.org/kosovo>. In response to critics of the Hate Speech Regulation, he comments:  
This new regulation has provoked strong reactions and some allegations that it is targeting the media specifically. This is not the case! The new regulation is absolutely in line with international covenants on freedom of speech and expression and it has been worked out after consultation with the Kosovo Joint Advisory Council of Legislative Matters, the Council of Europe and the UN.  
See also Section 1.1 of Regulation 2000/37, which states in full:  
The Temporary Media Commissioner, in special circumstances, may issue temporary Codes of Conduct. Before issuing any such code, the Temporary Media Commissioner shall consult with the Special Representative of the Secretary-General, and interested, media-related parties as appropriate.  
It is also possible that the SRSG vetted the proposed norms with consultative bodies such as the IAC and KTS.
32. Copy on file with the authors.
33. Everts, Speech on the occasion of the opening of the new RTK studios, 16 February 2000.

34. Ibid.
35. This more aggressive approach was without regard to distinctions between different forms of media (electronic or print). Despite protests to the contrary, one important consequence of this particular form of intervention is the elision of distinctions between the authority's treatment of broadcast media and its treatment of print media. It is true that licensing existed only for broadcasters, but, as it turned out, the burden of concern about violations that might upset the public order dealt with violations by the press. The authority to close down newspapers was actually used with newspapers, though not with radio and television stations.
36. Ibid. and Strohmeier, 'Collapse and Reconstruction', pp. 48–50, 58–60. It is also important to note that much of the concern about violence stemmed from content in Kosovar publications that identified individual Kosovars, not members of other ethnic groups. For example, this was the case in the three formal prosecutions brought by the TMC.
37. TMC's Simon Haselock has been a vocal proponent of this view. In his 20 February 2001 sanctioning decision in *Epoka e Re*, for example, he stated:  
In my decision of 1 December against *Bota Sot* I explained why the conditions in Kosovo could not yet be described as approximating a fully functioning democracy. I went on to describe that violence remained a regular means by which differences were resolved and scores settled and that the fear of violence was self-evident across the whole spectrum of society . . . [M]y main function in these cases is to uphold the rights of the individual against the threat of violence and increased tension caused by this irresponsibility. 'Sanctioning Decision on *Epoka e Re*', para. 8 Online at the OSCE Mission in Kosovo web site: <http://www.osce.org/kosovo>.
38. Convention on the Prevention and Punishment of the Crime of Genocide (1948). Article III(c) states that '[d]irect and public incitement to commit genocide' is one of the acts that parties shall make punishable. Article V requires the parties 'to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention'.
39. International Covenant on Civil and Political Rights (1976). Article 20.2 requires parties to prohibit by law '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence'.
40. International Convention on the Elimination of All Forms of Racial Discrimination (1966). Article 4(a) requires parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.
41. 'Temporary Code of Conduct for the Print Media in Kosovo', Section 6.1. We do not wish to suggest that the normative base is free of problems. For example, we note that dissemination of 'false or deceptive' material in Section 6.1 is enforceable even without any need for the TMC to demonstrate that it was injurious to an individual. This is a significant departure from traditional notions of defamation law in domestic legal systems, which could potentially be applied to infringe seriously the exercise of expression.
42. The absence of such provisions demonstrates the influence of the *Lingens v. Austria*, (1986) 8 EHRR 407, line of decisions by the ECtHR, in which the Court has ruled on numerous occasions that in public political debate, public officials are not entitled to the same measure of legal protection as are private citizens. See

- Harris et al, *Law of the European Convention on Human Rights*, pp. 397–401; and van Dijk and van Hoof, *Theory and Practice*, p. 572.
43. See, e.g., *Brandenburg v. Ohio*, 395 U.S. at 447, in which the United States Supreme Court stated that:  
[C]onstitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.  
Improvements to the normative base certainly can be made: while Section 2.1 of the print media Code of Conduct clearly seeks to replicate aspects of the *Brandenburg v. Ohio* rule, it does not include the element that the advocacy in question has been 'directed to' inciting or producing lawless action. This absence could expose speakers to prosecution under Section 2.1 even where they did not intend to 'produce' an actionable harm.
44. The international community since 1945 has been creating norms; what is new here is that it is international agencies that are applying these norms.
45. See, e.g., Council of Europe, *The Administration and You*; Amerasinghe, 'The Future of International Administrative Law', p. 773; Price and Krug, *The Enabling Environment for Free and Independent Media*.
46. Article 6.1 states 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' A recent ECtHR judgement construing and applying this provision is *Lauko v. Slovakia* (unreported, 2 September 1998), paras. 56–8. In our opinion, there is little doubt that the module's prosecutorial process presents a determination of a person's 'civil rights and obligations' or of 'criminal charges against him' and therefore implicates Article 6.1. For one thing, it is likely that these proceedings would be viewed as 'criminal' in nature for purposes of Article 6.1. Here, of particular note are the facts that the SRSG Regulations are generally applicable and that the TMC identifies the purposes of its monetary sanctions as 'punitive' and 'deterrent' – factors that the ECtHR has found determinative in concluding that Article 6.1 is implicated. Even if the TMC proceedings are not criminal in nature, it is likely that they would satisfy the 'civil rights and obligations' standard in Article 6.1. In its case law, the ECtHR has ruled that administrative proceedings that may result in a negative impact on a person's business, property, or conduct of a profession will implicate Article 6.1. See Harris et al., *Law of the European Convention* pp. 174–95.  
Meanwhile, it is important to note as well that the MAB itself has concluded that it is bound to observe the standards of Article 6.1. See the MAB's decision in *Belul Begaj and the Newspaper Dita, Appellant and Temporary Media Commissioner, OSCE, Respondent*, paras 62–7.
47. See Chayes and Chayes, *The New Sovereignty*, pp. 22–8. See also Helfer and Slaughter, 'Toward a Theory', p. 287.
48. Much of the tone can be attributed to the approach of Simon Haselock, who had been an architect of information intervention in Bosnia Herzegovina and then became Temporary Media Commissioner in Kosovo in August 2000.
49. TMC, 'Sanctioning Decision on *Epoka e Re*', para. 8.
50. Office of Media Appeals Board, 'Altering Photographs'. Online at the OSCE Mission in Kosovo website: <http://www.osce.org/kosovo>
51. TMC, 'Sanctioning Decision on *Epoka e Re*', para. 10(a).

52. MAB decision in *Sylejman Aliu and the Newspaper Bota Sot, Appellant and Temporary Media Commission, OSCE, Respondent*, paras 11–16.
53. Copy on file with the authors.
54. Regarding party affiliation, see: 'President, Kosovo Party Leader Discuss Macedonia Border Situation', BBC Summary of World Broadcasts, 16 March 2001; and David Holley, 'Yugoslavia Power Changes Hands', *Los Angeles Times*, 7 October 2000.
55. The first case was the TMC's 20 July 2000 sanctioning decision against the newspaper *Dita* and its publisher, Belul Beqaj, in which a fine of DEM 25,000 was imposed. This decision was appealed to the MAB, which reversed the TMC's decision on procedural grounds: *Belul Beqaj and the Newspaper Dita, Appellant and Temporary Media Commissioner, OSCE, Respondent*. The second case involved the TMC's sanctioning decision of 1 December 2000 (following an MHB decision dated 13 November 2000) against the newspaper *Bota Sot* and its publisher, Sylejman Aliu, in which a fine of DEM 50,000 was imposed. This decision was appealed to the MAB, which in a 19 February 2001 decision upheld the TMC's action: *Sylejman Aliu and the Newspaper Bota Sot, Appellant and Temporary Media Commission, OSCE, Respondent*. The third case was the TMC's 20 February 2000 imposition of sanctions (following an MHB decision of 6 December 2000) amounting to DEM 5,000 (along with other remedies) against the newspaper *Epoka e Re*. Sanctioning Decision on *Epoka e Re*. Online at the OSCE Mission in Kosovo website: <http://www.osce.org/kosovo>. To our knowledge, that decision was not appealed.
- Each of the cases has had a different procedural history. In *Dita*, there was no MHB decision. In *Bota Sot*, there was both an MHB decision and an MAB decision. In *Epoka e Re*, there was an MHB decision, but apparently not an MAB decision.
56. See, for example, Section 2.1 of UNMIK Regulation 2000/37, which authorizes the TMC to impose one or more of the following sanctions: a warning; the requirement to publish a reply, correction or apology; a fine of not less than DM 1,000 and not exceeding DM 100,000; seizure of equipment and/or printed material; and suspension or closure of operations.
57. For recent discussion, see the ECtHR decision in *Tammer v. Estonia* [Application no. 41205/98; Judgement of 6 February 2001], paras 35–8.
58. 'Sanctioning Decision on *Epoka e Re*' (Note 58).
59. Special Representative Executive Decision No. 2000/2 (UNMIK/ED/2000/2, 30 May 2000), cited in the MAB decision in *Belul Beqaj and the Newspaper Dita, Appellant and Temporary Media Commissioner, OSCE, Respondent*, para. 21.
60. It is possible that *Dita*'s acts might have been a violation of existing domestic law in effect at the time, but this was not the articulated basis for the SRSG's action.
61. The equality before the law standard requires that in addition to the right to be heard, that the defendant be placed on an equal footing with the accuser in the process. See Council of Europe, *The Administration and You*, pp. 14–16.
62. MAB decision in *Belul Beqaj and the Newspaper Dita, Appellant and Temporary Media Commissioner, OSCE, Respondent*, para. 65.
63. *Ibid.*, para. 89.
64. Media Hearing Board Rules of Procedure (Note 24). In Bosnia and Herzegovina, of particular importance for procedural considerations is the IMC document entitled 'Procedure for Handling Cases' (adopted 8 December 1998, and amended

- 9 June 1999 and 21 October 1999), Online [June 2001], available at [http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg\\_3.html](http://www.imcbih.org/Download/DLRegulations/DLReg/dlreg_3.html)
65. SRSG Reg. 2000/37, Section 2.3.
66. Media Hearing Board Rules of Procedure, Section 15 (Note 24).
67. *Ibid.*, Sections 17 ('Absent fraud or intentional malfeasance, the decision of the Board is deemed final and not subject to appeal. Both the TMC and the respondent are bound to the decision.') and 18 ('In [the] event that the ruling favors the respondent, the respondent shall be protected against double-jeopardy, and the TMC shall drop all related complaints stemming from the original complaint.').
68. *Ibid.*, Sections 6, 8, and 11–12.
69. *Ibid.*, Section 7.
70. In Bosnia and Herzegovina, the Enforcement Panel will rule on both the questions of liability and the nature of sanctions if the defendant is guilty. These decisions may be appealed to the IMC Council. 'Regulation for the Independent Media Commission (IMC)' (adopted 16 September 1998, amended 8 September and 21 October 1999), Section 16. Available at <http://www.imcbih.org>
71. Council of Europe, *The Administration and You*, pp. 37–43.
72. UNMIK Regulation No. 2000/36, Section 1.1.
73. *Ibid.*, Section 1.2.
74. Harris et al., *Law of the European Convention*, p. 231.
75. Judgement in *Lauko v. Slovakia*, para. 63 (Note 49). See also the discussions of the Court's Article 6.1. case law on this question in Harris et al., pp. 231–4; and van Dijk and van Hoof, *Theory and Practice*, pp. 451–2.
76. According to UNMIK Regulation 2000/36, Section 4.2(c), the MAB's power of review is limited to sanctioning decisions of the TMC; in other words, acts of the TMC after the end of the investigation and the MHB hearing. Thus, arbitrary use of the powers of pre-hearing investigation, such as unreasonable searches, are insulated from any review. This is because the MHB is also not competent to rule on these questions, but is limited to deciding the question of the accused's guilt or innocence and making recommendations as to mitigating or aggravating circumstances. 'Media Hearing Board Rules of Procedure' (adopted 7 November 2000), Section 15. Online on the OSCE Mission in Kosovo website, <http://www.osce.org/kosovo/>
77. The MAB's review power does not appear to extend to decisions of the MHB as to guilt or innocence. See UNMIK Regulation 2000/36, Section 4.2(c) [MAB's review limited to 'sanctions imposed by the Temporary Media Commissioner']; and 'Media Hearing Board Rules of Procedure' (adopted 7 November 2000), Section 17 [decisions of the MHB are not normally subject to appeal]. It is possible that the question of Section 4.2(c) reflects simply a failure to revise UNMIK Regulation 2000/36 following the November 2000 creation of the MHB. However, Section 17 is quite explicit.
78. The MAB, upon reviewing Regulations 2000/36 and 2000/37, has concluded that it is not competent to review acts of the SRSG. See *Belul Beqaj and the Newspaper Dita, Appellant and Temporary Media Commissioner, OSCE, Respondent*, paras 54–6; *Sylejman Aliu and the Newspaper Bota Sot, Appellant and Temporary Media Commission, OSCE, Respondent*, para. 64.
79. 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', S/1999/779 (12 July 1999), Online [June 2001], available at



<http://www.un.org/Docs/sc/reports/1999/s1999779.htm> paras. 82-3 include the following:

UNMIK has the unprecedented opportunity to lay the foundation for democratic and professional media in Kosovo . . . UNMIK will support the emergence of independent media and will monitor compliance with international media standards. The Special Representative will appoint a media regulatory commission to manage the frequency spectrum, establish broadcast and press codes of conduct, and issue licences . . . In facing the challenge of fostering the development of independent media in Kosovo, UNMIK will promote a media culture based on democratic principles.

80. See detailed reports in the contributions of Thompson and De Luce, and of Thompson and Mertus to this volume (Chapters 7 and 9). *The New York Times* disparagingly characterized the module as an 'international media ministry' in 'Kosovo's Incipient Media Ministry' (30 August 1999).
81. On at least one occasion, acts taken in operation of the module have had an impact outside the post-conflict zone. In April 2001, a news distributor in Switzerland, fearing violation of that country's anti-racism laws, decided to discontinue distribution of the newspaper *Bota Sot*. Reportedly, the decision was taken following the TMC's denunciation of *Bota Sot* for published statements regarding the tense situation in the Former Yugoslav Republic of Macedonia. See 'Switzerland: Albanian Paper Banned from Sale for Inciting Ethnic Hatred,' BBC Monitoring World Media Service, 10 April 2001.